Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

JAMES F. McMANUS,

Petitioner.

—v.—

CIVIL AERONAUTICS BOARD,

Respondent,

UNITED AIR LINES, INC.,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, James F. McManus, prays that a writ of certiorari issue to review a Decision, Judgment and Decree of the United States Court of Appeals for the Second Circuit, which affirmed proceedings and orders of the Civil Aeronautics Board with respect to resolutions promulgated and filed with the Board by the Air Traffic Conference of America (ATC), a trade association of all of the scheduled domestic air carriers. Such resolutions established criteria and procedures for the selection of ticket agents and provides that no member party thereto may pay any commission or remuneration to a ticket agent until and unless he, his premises and location are selected by the Agency Committee of ATC. He also petitions that such writ include a review of such Order, Judgment and Decree in that it dismissed petitioner's petitions with respect to similar resolutions of the International Air Transport Association.

Opinion Below

The decision of the Court of Appeals was decided February 6, 1961 (Appendix A, p. 23).

Jurisdiction

The Judgment and Decree of the Court of Appeals was entered on February 21, 1961 (Appendix B, p. 32). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(a) Whether such conference resolutions are within the the scope of Section 412 of the act.

(b) Whether or not the Board must disapprove such conference resolutions as adverse to the public interest and in violation of its own governing statute.

(c) Whether the Board may approve such conference resolutions in any respect.

(d) Whether or not Sections 412 and 414 of the act are constitutional or fatally defective.

Constitutional Provisions Involved

Article VI of the Constitution:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; . . ."

The Fifth Amendment of the Constitution:

"No person * * * shall be * * * deprived of life, liberty or property without due process of law; * * * "

The Seventh Amendment of the Constitution:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Statutes Involved

It is noted that the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C.A. Section 1301 *et al.*) supersedes the Civil Aeronautics Act of 1938 as amended (52 Stat. 977, 49 U.S.C.A. Section 401 *et al.*).

Pertinent provisions thereof are set forth:

Section 101 (32) of the Federal Aviation Act formerly Section 1 (32) of the Civil Aeronautics Act:

"'Ticket agent' means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or a foreign air carrier, who as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation" (72 Stat. 740, 49 U.S.C.A. 1301 formerly 52 Stat. 977 as amended by 62 Stat. 493, 65 Stat. 68, 66 Stat. 628, 49 U.S.C.A. 401).

Section 411 of the Federal Aviation Act and of the Civil Aeronautics Act:

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition" (72 Stat. 769, 49 U.S.C.A. 1381 formerly 52 Stat. 1003 as amended by 66 Stat. 628, 49 U.S.C.A. 491).

Section 412 of the Federal Aviation Act and of the Civil Aeronautics Act:

"(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, op-

pressive, or wasteful competition, or for regulating stops, schedules, and character of service, for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of air craft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it" (72 Stat. 770, 49 U.S.C.A. 1382 formerly 52 Stat. 1004 as amended by 56 Stat. 301, 49 U.S.C.A. 492).

Section 413 of the Federal Aviation Act and of the Civil Aeronautics Act:

"For the purposes of this title, whenever reference is made to control, it is immaterial whether such control is direct or indirect" (72 Stat. 770, 49 U.S.C.A. 1383, formerly 52 Stat. 1004, 49 U.S.C.A. 493).

Section 414 of the Federal Aviation Act and of the Civil Aeronautics Act:

"Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby relieved from the operations of the antitrust laws, as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful re-

straints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order" (72 Stat. 770, 49 U.S.C.A. 1384 formerly 52 Stat. 1004, 49 U.S.C.A. 494). It is noted that 49 U.S.C.A. 1384 refers to statutory sections.

Statement of the Case

Petitioner, more than seven (7) years ago in March of 1954, established two travel agencies in Nassau County in communities where there were no facilities for the purchase of transportation tickets. He promptly experienced difficulties with respect to business dealings with carriers: made informal complaints to the Civil Aeronautics Board relative to air carriers; received no satisfaction from the Board; dismantled one travel agency; gave public testimony in March of 1956 in an investigation of the airlines conducted by the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives.

The Board at the behest of the said Antitrust Subcommittee did, on October 31, 1956, make its orders Nos. E. 10719 and E. 10720 finding that it was necessary in the public interest to determine if agency resolutions enumerated should be approved or disapproved. Order No. E. 10719 dealt with resolutions of air carriers with respect to domestic air transportation and was termed the ATC Agency Resolution Investigation.

Order No. E. 10720 had to do with resolutions of air carriers and foreign air carriers with respect to foreign

air transportation and was termed the IATA Agency Resolution Investigation.

It is noted that the Board instituted these proceedings in 1956, only after an appropriate letter from the chairman of the said subcommittee to the effect:

> "I believe that it is imperative that the Civil Aeronautics Board resolve this matter without delay."

Petitioner was granted leave to intervene in the ATC Agency Resolution Investigation after his petition therefor had included:

> "That James F. McManus has a right to conduct a business in the sale of air transportation but has been illegally and unconstitutionally restricted in the sale thereof all through a total commercial boycott that has been effective as to him."

Petitioner testified and was cross-examined in said proceeding in April 1957. After some three years an application for the selection and appointment of his one remaining Levittown Travel Agency was sponsored by American Airlines Inc. and co-sponsored by Northwest Airlines Inc. under the procedures then in use. The record of the Board's proceedings was closed in May of 1957—the aforesaid sponsored application was "disapproved" by the ATC Agency Committee at their closed annual meeting in September 1957—the record of the Board's proceeding was re-opened, your petitioner gave further testimony and was again cross-examined in February 1958. An Initial Decision of the Board's Examiner was served on November 3, 1958 and the Board began serving its orders in June of 1959 which would perpetuate the conference system of control of ticket agents and the Board's proceedings with respect thereto, despite the fact that your

petitioner has demonstrated that it does not provide for due process but on the other hand has been and continues to be an interference with due process.

It is noted that the Examiner's Initial Decision observed at page 80 thereof:

> "That the Board has no jurisdiction to regulate the selection and retention of ticket agents there can be no dispute"

and further at page 87 thereof:

> "A full-fledged or general travel agent must have access to the sale of air transportation on a commission basis if he is to economically survive and before he can sell air transportation on a commission basis he must have ATC approval."

The Order of the Board (CAB Order No. E. 14012) issued on June 10, 1959 made a part thereof its 19 page decision which had expressly recognized at page 12 thereof:

> "It must always be realized that this entire system of joint carrier screening of travel agencies is a substantial departure from the normal free competitive practices of our economy, and it would be clearly in violation of the Federal Antitrust Laws were it not for the immunity extended by Section 414 of the Act. This is not a situation, therefore, where we can grant to the carriers on the basis of management expertise or discretion freedom to make decisions without detailed Board supervision and control. Through the ATC system the carriers hold life-and-death power over the travel agencies, and it is unthinkable that the carriers should exercise these powers without giving full notice of their reasons and providing ample op-

portunity for appeal. Certainly the carriers who here request the right to pass on agency applications and suspensions with no explanation of their actions and no real appeal would be the first to plead lack of due process if their own affairs were so regulated by the Civil Aeronautics Board."

Subsequent orders of the Board here involved pretend to approve further resolutions submitted by ATC in a pretended effort by ATC to amend their resolutions in an effort to satisfy the Board despite your petitioner's objections thereto especially to those parts thereof which would now coerce your petitioner and all ticket agents to sign waivers with respect to libel and agree to submit disputes under remaining qualification standards to a mandatory arbitration final upon the ticket agent.

Petitioner submits ATC never had and does not now have any right to impose, promulgate, interpret and enforce any resolutions controlling ticket agencies or any related industry in any respect.

Your petitioner trusts that this Court will grant his petition for a writ of certiorari so that the Supreme Court may review its action whereby it would affirm the Board's orders pertaining to the ATC Agency resolutions, especially since the Board itself acknowledges that it does not have authority to do what it would say ATC may do only by reason of the Board's approval, pursuant to Section 412 of the Act.

Petitioner believes it is most significant to note that the Decision of the Court of Appeals itself states in part:

"It may well be that Congress did not intend to cover so broad an area by enacting Section 412, and that the airlines should not be permitted to exercise

concerted control which is immune from antitrust regulation over some related industry such as that of ticket agencies. * * * ".

Reason for Granting the Writ

The Court of Appeals actions with respect to the orders of the Civil Aeronautics Board involve important questions of federal law which should be but have not been settled by the Supreme Court and in addition would decide federal questions in a way which would conflict with the constitution and applicable decisions of the Supreme Court.

Argument

(a) The Importance of the Questions

Your petitioner respectfully submits that the air carrier industry is one of the largest industries. In the event that ATC, the one and only combination of all scheduled domestic carriers, can exercise such concerted control over related industries such as that of ticket agencies, your petitioner submits that such is a grave threat to all those who might wish to enter and compete in such related fields. Your petitioner submits that all of such constitutes a grave threat to the American system of free enterprise.

It is significant to note that the aforesaid Anti-trust Subcommittee itself issued a report dated April 5, 1957, reporting its findings at length with respect to the same matter and while minority members of the said Subcommittee filed dissents with respect to certain aspects of the report they were in accord in all respects insofar as the report dealt with the matter of the selection and retention of travel agents. It is respectfully submitted that the Court of Appeals Decision is not in accord with the

said Antitrust report which contains the following conclusion at page 273 thereof:

"Congress in the Civil Aeronautics Act conferred extensive powers on the Board to regulate all persons engaged in air transportation. Since the term "air transportation" does not include the sale of air-travel tickets the Board has no authority to regulate directly the entry into the travel agency business. The Board's approval of a series of agreements submitted by the certificated industry, however, has resulted in the exercise of controls by the air-traffic conference over entry into the business of selling travel agency services for air transportation on the scheduled industry's routes. Thus, by indirection, the Board has authorized a type of regulation which it could not undertake to exercise itself. Despite a mounting tide of criticism evoked by its travel agent procedures, until the committee's hearings the Board persistently refused to cope with the problem and sought to forestall any criticism by misleading statements to the committee.

The net effect of the Board's approval of the agency system fabricated by the ATC and IATA has been to make it possible for the private trade associations of the certificated carriers to determine which agents, and how many of them, are to be accorded the privilege to sell transportation on the scheduled commercial airways. This entire process of decision-making is carried out by the airlines on a unilateral basis and is not subject to review from any quarter.

The Board not only has permitted a system whereby the trade association administers standard commission rates and a uniform procedure for the selection and retention of agents. The Board also permits the

carriers' trade associations to limit the overall number of travel agents by areas. This limitation on the number of travel agents by areas is approved by the Board to protect the trade associations' accredited agents from competition.

In this regard the Board has extended the scope of its regulatory function beyond the limits of its authority. Carried to its logical extreme the Board's rationalization of its action would sanction an artificially imposed check upon competition in the many industries, like the travel agency industry, that are on the periphery of commercial air transportation but which admittedly lie outside the scope of the Board's regulatory authority. Neither the act nor its legislative history contains any indication that Congress intended the CAB to transcend the bounds of its jurisdiction and seek to shield nonregulated industries from the normal incidents of competition. It is intolerable for a governmental regulatory board to countenance a situation in which a private trade association determines the appropriate level of competition for different areas of the country. It is all the more intolerable when this determination is made for the members of another industry.

Even if travel agents were not outside the orbit of the Board's jurisdiction the committee could not accept the Board's claim that the present agency procedures best serve the public interests, the interests of the ticket agents or even necessarily the interests of the certificated carriers. The Board apparently expects that private commercial trade associations will assume the attributes of quasi-judicial tribunals and conduct themselves accordingly. This view is unrealistic and does not accord with the principles of

good business administration or sound Government regulation.

If the CAB believes that licensing of travel agents based upon a review of their qualifications is necessary to encourage and develop the air transportation system, this function must be exercised by an agency of the Government. If the CAB reaches this conclusion it would be appropriate for it to recommend to the Congress enactment of suitable legislation to accomplish this purpose.

Joint action of the certificated industry pursuant to an agreement under Section 412 of the Act, however, would be entirely separate from any licensing function authorized by legislation. Pending enactment of such legislation the committee believes the Board should approve under Section 412 only such joint activities required for the ATA and IATA to propose maximum travel agent commission rates for their members and the minimum qualifications any travel agent must possess to be eligible for appointment by the member carriers. Application of these qualifying standards to the appointment of a particular agent should be exercised by the carriers on an individual basis and should not be undertaken by joint action through the trade associations. The Board should withdraw its approval from all provisions of the agency resolutions submitted by ATA and IATA which are inconsistent with the foregoing."

In addition your petitioner respectfully submits that the Court of Appeals' decision would indicate that the Board may be authorized to approve "conference resolutions" with respect to the sale of air transportation in a manner in which worldwide ocean shipping may be regulated despite the fact that the term "conference" is not included in Sec-

tion 412 of the Federal Aviation Act as it is expressly set forth in Section 15 of the Shipping Act. Petitioner submits that such an important question should be here and now settled by the Supreme Court.

(b) The Court of Appeals' Decision Is Erroneous

Your petitioner respectfully submits that Section 412 requires the Board to *disapprove* agreements that it finds adverse to the public interest and in violation of the Act.

If the standard "adverse to the public interest" is an adequate standard for *disapproval* it is respectfully submitted with reference thereto that the Board, pursuant to Article VI of the Constitution, was obliged to disapprove all ATC agency resolutions as adverse to the public interest as *per se* violations of the antitrust laws. It was before the Court of Appeals that your petitioner had cited *Fashion Originators Guild* v. *FTC*, 312 U. S. 457 and had demonstrated that the ATC agency resolutions provided for every vice condemned by the Supreme Court. The Board itself has in the past, and as recently as March 15, 1961, in its order No. E-16518 recognized that it must take the antitrust policy of the Nation, as interpreted by the Supreme Court, into consideration. In such order, in disapproving an ATC Resolution with respect to credit cards of the American Express Company, it relied upon *Fashion Originators Guild* v. *FTC*, 312 U. S. 457.

It is most significant to note that the ATC Agency Resolutions before the Court of Appeals have been judicially construed to provide for boycotts and I quote from *Putnam* v. *ATA*, 112 F. Supp. 885 (1953):

> "In other words the so-called boycotting of, and discrimination against plaintiff are the inevitable result of the Board-sanctioned agreement among the mem-

bers of the conference that they will not employ unapproved agents."

I am confident that this Court will observe that if the ATC Agency Resolutions involved are within the scope of Section 412 of the Act that this Court will hold that the Board's authority must be limited to an unqualified disapproval thereof in view of its further decision in *Klors* v. *Broadway-Hale et al.*, 359 U. S. 207.

Petitioner submits that in view of the legislative history of the Civil Aeronautics Act whereby members of Congress insisted upon the insertion of unequivocal language in order to make it clear that the Board was duty bound to prevent monopolies in air transportation that the "conference resolutions" with respect to the sale of air transportation were not within the purview of those agreements over which the Board might have any jurisdiction pursuant to Section 412.

It would appear that a resolution in restraint of trade is void to begin with, that the Courts and the Department of Justice alone are vested by Section 15 U. S. C. 4 with exclusive authority with respect to Sherman Act violations as was observed by the Southern District Court in *United States* v. *Pan American et al.*

It is respectfully submitted that Congress did not define the word "agreement" as used in Section 412 to include "conferences" as it did in Section 15 of the Shipping Act.

It is respectfully submitted that, in view of Section 408 of the Act, Section 412 can only be construed to give the Board authority to approve agreements which would be short of merger, that is, one carrier might file an interline tariff with another carrier, or be allowed to use another's equipment or airport facilities. *United States Lines Co.* v. *CAB*, 165 F. 2d 849 (2d Cir. 1948), an agreement between

one air carrier and one steamship carrier was not a "conference" agreement. Your petitioner submits that *Apgar Travel Agency, Inc.* v. *IATA*, 107 F. Supp. 706 (S. D. N. Y. 1952) can not be cited as a settled authority for the Board's *approval* of any conference system control of travel agencies especially in view of the Board's own words in footnote 31 of the opinion accompanying its order No. E-14012 to the effect:

> "The applicability of the doctrine of exclusive primary jurisdiction to antitrust suits involving acts within the purview of Section 412 of the Act is not free from doubt. Compare Apar Travel Agency v. IATA, 107 F. Supp. 706 (S. D. N. Y. 1952); Putnam v. ATA, 112 F. Supp. 885 (S. D. N. Y. 1953); S. S. W. Inc. v. ATA, 191 F. 2d 658 (D. C. Cir. 1951), certiorari denied, 343 U. S. 955 (1952), and Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed, 204 F. 2d 230 (3 Cir. 1953), certiorari denied, 346 U. S. 806."

Indeed your petitioner believes that *Apgar Travel Agency, Inc.* v. *IATA, et al.* must now have the attention of this Court since it would observe:

> "The thought that C.A.B. has authority, for example, to exempt a conspiracy of defendants to induce landlords to impose restrictive covenants in leases with independent travel agencies precluding them from selling non-scheduled air transportation is one to paralyze the judicial conscience."

The standard of Section 412 whereby the Board may *approve* agreements is not definite enough to withstand constitutional attack. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24 (1932), cited by the Court

of Appeals, involved an affirmative standard—the government agency could "approve" agreements that it found necessary in the public interest. The "approval" standard in Section 412 of the Act is a *negative* standard whereby the Board *shall approve* "any such contract or agreement, or any modification thereof, that *it does not find* to be adverse to the public interest or in violation of this Act." Petitioner submits that other Sections of the Act require a notice of hearing to persons known to have a substantial interest in the proceeding. The "approval" part of Section 412 requires no notice, no hearings, no findings, and your petitioner respectfully submits that *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24 (1932) is not in point.

The Court of Appeals would err further in citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 396 (1940). In such case Congress itself laid down precise standards for the government agency itself to interpret and enforce. In the "conference" system to use the words of the Court of Appeals:

> "The associations have been formed to take joint action on industry-wide problems. In these resolutions *they* established criteria and procedures for the selection, appointment and retention of ticket agents, and provided that no member could appoint or retain a travel agent who had not applied to that association and been approved by it."

The Court of Appeals has further recognized the fact that the resolutions are "*promulgated* and filed" with the Board by the Air Traffic Conference and the International Air Transportation Association.

The record before the Court of Appeals showed that the resolutions provided and still provide for "Star Chamber"

proceedings where the applicant for entry into the business of the sale of air transportation is tried "in absentia."

The Board in view of the Seventh Amendment of the Constitution had no right to suggest any requirements with respect to waivers of libel or ' datory arbitration proceedings and subsequently appr. same.

Section 414 of the Act is unconstitutional for it interferes with, rather than preserves, rights to trial by jury.

Petitioner submits that a boycott is crime—it is a crime against the person—it is a crime *malum in se*. If the statutes in question could be construed in any respect to authorize the Board to approve machinery, the inevitable result of which is a boycott or concerted refusal to deal, the statutes in question must be condemned.

The Court of Appeals has erred where it would say:

"No legislative delegation exists here, however."

after it had expressly recognized:

> "It may well be that Congress did not intend to cover so broad an area by enacting Section 412, and that the airlines should not be permitted to exercise *concerted control* which is immune from antitrust regulation over some related industry such as that of ticket agencies."

It is respectfully submitted that the term "broker" has always been included in Section 403 of the Act; the definition of "ticket agent" in the Act includes the term "who as *principal* or agent sells or offers for sale any air transportation."

The definition of "ticket agent" in the Act uses identical terminology as used by Congress in defining "broker" with respect to surface transportation in 49 U. S. C. 303.

Petitioner, as a citizen of the State of New York, relies upon principles of co· tutional law from *Yick Wo* v. *Hopkins*, 118 U. S. 356 and *Butchers Union Co.* v. *Crescent City*, 111 U. S. 746 as quoted at length by the New York Court of Appeals in *People ex rel. Tyroler* v. *Warden*, 157 N. Y. 116, 51 N. E. 1006.

The Board does not have any authority to permit the ATC to limit the Congressional definition of "ticket agent," exclude from or bar entry into a field to any person who would not or could not bend a knee and be dubbed "conference agent" and thereby be included on the ATC Agency list.

Petitioner respectfully submits that this Court should decide whether the ATC Agency Resolutions are within the scope of the statutes involved and if they are to condemn the statutes in view of the following language of *Carter* v. *Carter Coal Co., Inc.*, 298 U. S. 238 at page 311:

> "*Since in the very nature of things, one person may not be entrusted to regulate the business of another,* and *especially a competitor,* and a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. *The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decisions of the Court which foreclose the question.* ALA Schechter Poultry Corp. v. United States, 295 U. S. at p. 537, 79 L. ed. 1584, 55 S. Ct. 837, 97A L. R. 947; Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 159, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 1952; Washington 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654." (Italics mine.)

So much for the Court of Appeals' affirmation of the Board's orders with respect to the ATC matters.

In the IATA matter petitioner submits that Order E-14436 was appealable where it refused

(a) to withdraw its approvals of IATA resolutions and rejected your petitioner's jurisdictional and constitutional arguments;

(b) to find an objected to conference and related matters between members of its staff and a former attorney —counselor for the Board on behalf of some 10 carrier parties unlawful and void;

(c) to terminate its proceeding.

This Court may and should take notice that the Board, after the Court of Appeals' decision of February 6, 1961, turned around and on March 1, 1961 used such Court of Appeals' decision to dispose of your petitioner in its Order No. E-16459 saying:

> "James F. McManus, an intervenor whose application for approval as an IATA agent has been denied, contends that the Board is without power either to approve, or to condition its approval of, the IATA resolutions. These questions, however, have been rendered moot by the recent Court decision rejecting Mr. McManus' similar attack on the approval of the ATC resolutions."

and then proceeding without any evidentiary record gave IATA a further opportunity to amend its resolutions after "finding":

> "1. That, unless modified in accordance with this opinion, the resolutions of the International Air Trans-

port Association specified in Orders E. 10720, E. 14436 and E. 14909 are adverse to the public interest and in violation of the Act;

2. That said resolutions, if amended or revised as stated herein, are not adverse to the public interest or in violation of the Act and, accordingly, should be approved; and

3. That the record in this proceeding should be kept open for a period of sixty days from the date of service of our order herein for the purpose of permitting the International Air Transport Association to file amendments to or revisions of said resolutions in accordance with this opinion."

Petitioner submits that his supplemental petition before the Court of Appeals with respect to Order No. E. 14436, adopted September 10, 1959 annexed thereto and made a part thereof, a memorandum to the President of the same date of Hon. Louis J. Hector. An inspection of the Board's records indicates Member Hector's vote had been cast with respect to such order. Petitioner's supplemental petition before the Court of Appeals argued that Board Orders Nos. E. 14436 and E. 14508 were made in a manner condemned by Hon. Louis J. Hector.

Petitioner is confident that the Supreme Court will want to take a long look and re-appraise the "independent agency" especially in view of Member Hector's words to the President:

"As a lawyer, I have been disturbed at the inability of an administrative agency, such as the CAB, to give a true judicial hearing to parties who came before it in litigated cases. The agencies are long on judicial form and short on judicial substance."

Here the Court has the matter of an individual who endeavored to establish two travel agencies more than seven (7) years ago. In connection with same he found himself indulged and delayed for years in not one but indeed two Board proceedings with reference to matters that surely are not within the scope of the jurisdiction of the administrative agency.

CONCLUSION

For the reasons stated the Supreme Court should grant your Petitioner's prayer in every respect.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 92-3—October Term, 1960.

(Argued December 12, 1960 Decided February 6, 1961.)

Docket Nos. 25802-3

JAMES F. McMANUS,

Petitioner.

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

UNITED AIR LINES, INC.,

Intervenor-Respondent.

Before:

LUMBARD, *Chief Judge*,
SWAN and MOORE, *Circuit Judges*.

Petitions to review seven orders of the Civil Aeronautics Board issued pursuant to an investigation of agreements between air carriers filed under 49 U. S. C. §1382.

Dismissed in part and affirmed in part.

JAMES F. MCMANUS, *pro se.*

MORRIS CHERTKOV, Washington, D. C. (Franklin M. Stone, General Counsel, Civil Aeronautics Board, John H. Wanner, Deputy General Counsel, O. D. Ozment, Associate General Counsel, Litigation and Research, Abbott A. Leban, Robert A. Bicks, Acting Assistant Attorney General, Richard A. Solomon, Department of Justice, on the brief), *for respondent.*

HARDIN, HESS & EDER, New York City and

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT, Chicago, Ill., *for intervenor.*

LUMBARD, *Chief Judge*:

The petitioner, an owner of two travel agencies, seeks to have reviewed seven orders issued by the Civil Aeronautics Board during its consideration of resolutions promulgated and filed with the Board by the Air Traffic Conference of America (hereinafter ATC) and the International Air Transport Association (hereinafter IATA), trade associations of air carriers engaged respectively in domestic and international operations. The associations had been formed to take joint action on industry-wide problems. In these resolutions they established criteria and procedures for the selection, appointment, and retention of ticket agents, and provided that no member of an association could appoint or retain a travel agent who had not applied to that association and been approved by it.

The original resolution establishing this procedure was drawn up by ATC in 1940 and submitted for the approval of the Civil Aeronautics Board under §412 of the Civil Aeronautics Act of 1938, later re-enacted as §412 of the

Federal Aviation Act of 1958, 49 U. S. C. §1382. Approval was granted on April 18, 1941 (Order No. E-983). Subsequent agreements similar in substance were approved in 1945 and 1951. After having received complaints regarding the procedures instituted by the conference agreements, the Civil Aeronautics Board issued an order on October 31, 1956, instituting an investigation to determine whether the conference system for qualifying ticket agents established by the ATC resolution was in the public interest. Various parties, including the petitioner herein, were permitted to intervene, public hearings were held, and briefs were filed. In an Initial Decision dated November 3, 1958, the Hearing Examiner held that the ATC resolution was not adverse to the public interest and should be approved by the Board provided that certain amendments were made thereto. This decision was substantially adopted by the Civil Aeronautics Board in Order No. E-14012, dated June 10, 1959, which also kept the record open for 60 days to permit the ATC to file the required amendments. Two subsequent supplemental orders, No. E-14647 (November 12, 1959) and No. E-14924 (February 15, 1960), modified the order of June 10 by directing that certain additional amendments to the resolutions be filed. On April 22, 1960, the Board, in Order No. E-15143, dismissed the petitioner's motion seeking review of the decision of the Board's Chief of Compliance not to institute enforcement proceedings against the ATC for violating the Federal Aviation Act by acting under the approved resolution.

The petitioner also seeks review of three orders issued in the course of the Board's consideration of the related IATA resolution. At the same time as it authorized the ATC investigation, the Board instituted an investigation of a similar resolution submitted by the IATA. No further steps were taken with respect to the IATA resolution during the pendency of the ATC investigation. In 1958 the

petitioner demanded an immediate hearing with oral argument on a motion he had filed with the Board requesting it to withdraw its approval of a similar IATA resolution which had been approved eight years earlier. After some correspondence between the Board and the petitioner, the Board issued Order No. E-13959 (June 1, 1959), denying the request for a hearing and oral argument. Having decided to proceed with the IATA investigation once the ATC case had been completed, the Board on September 10, 1959, issued Order No. E-14436, in which it granted the petitioner leave to intervene but denied his motions that the Board immediately withdraw its approval of the resolution, that votes on an earlier motion be entered on the record, that copies of certain correspondence be made part of the record, and that the notice for a prehearing conference which had been scheduled be vacated. On September 30, 1959, the Board issued Order No. E-14508, in which certain IATA resolutions relating to sales agents were approved "except as they apply to the United States." It is these orders that the petitioner wishes to have reviewed by this court along with the orders issued in the course of the ATC investigation.

I.

The petitioner claims that this court has jurisdiction to review the above orders under §1006 of the Federal Aviation Act of 1958, 49 U. S. C. §1486, and §10 of the Administrative Procedure Act, 5 U. S. C. §1009. Although the judicial-review section of the Federal Aviation Act is broadly phrased so as to authorize review of "any order, affirmative or negative, issued by the Board or Administrator," it also provides that review must be at the behest of "any person disclosing a substantial interest in such order." Order No. E-14508, which approved several IATA resolutions only insofar as they affected agents outside

the United States, in no way prejudiced the petitioner. The petitioner, therefore, does not have the "substantial interest" required by the statute to challenge Order No. E-14508.

The Board's order must be a final one to be reviewable. Although the statute does not expressly require that the order be final before it may be reviewed, the requirement of finality was read into §1006 of the statute's predecessor, the Civil Aeronautics Act of 1938, which was phrased in identical terms. See, e.g., *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956); *Western Air Lines* v. *CAB*, 184 F. 2d 545 (9th Cir. 1950); cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S. 103, 112-13 (1948). The Board's refusal to grant the petitioner a hearing on his motion requesting immediate disapproval of the IATA resolution did not deny a right or fix any legal relationship. If this order deprived the petitioner of any right granted by the statute, it may be reviewed when the final order issues. But it would needlessly encumber the administrative process if any denial of a hearing were held to be reason for staying further agency proceedings until the validity of such denial were passed upon by a court of appeals.

Similarly, the decisions relating to various procedural details made by the Board in its order of September 10, 1959, did not determine any rights or relationships and may not be reviewed at this time. Nor can the petitioner have these orders reviewed under §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c), which authorizes review of "every agency action made reviewable by statute and every *final agency action* for which there is no other adequate remedy in any court." (Emphasis added.) *Cities Service Gas Co.* v. *FPC*, 255 F. 2d 860 (10th Cir. 1958), *cert. den.*, 358 U. S. 837; see *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954), *cert. den.*, 347 U. S. 990. The decisions made by the Board in its order of

September 10, 1959, are of the kind encompassed by the second sentence of §10(c) of the Administrative Procedure Act, which directs that "any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." Since review is available at that time, the petitioner has an adequate remedy by review of the final decision. The petitions to review the orders entered in the course of the IATA investigation, Nos. E-13959, E-14436, and E-14508, are therefore dismissed.

II.

The Board's orders approving the ATC resolution, however, are reviewable final actions, and we proceed to consider the petitioner's objections. The resolution provided for the establishment of an Agency Committee with which applications would be filed by potential ticket agents. Only if the committee approved of the applicant would his name be entered on the ATC Agency List from which member carriers were required to select their agents. The Hearing Examiner and the Board held the plan not adverse to the public interest since it would, if properly administered, bring about a rise in the standards of agency representation. As a result of the Board's approval, carriers acting under the resolution were, by reason of §414 of the Federal Aviation Act,[1] exempted from the operation of the antitrust laws. The Board was aware of the restrictive effect which this practice would have on competition in

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1 "LEGAL RESTRAINTS

Sec. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

the ticket-agent market and its possible abuse, but it approved of the resolution nonetheless.[2]

The petitioner makes several attacks on the validity of the orders, the major claims of substance being that the ATC resolution was not within the scope of §412, that the Board's order, being conditional, was beyond its authority, and that §§412 and 414 amount to an unconstitutional delegation of legislative power to the airline industry and the Civil Aeronautics Board.

The language of §412[3] encompasses all contracts and agreements between air carriers for pooling services or for preserving efficiency of operation. The conference agreement considered by the Board in this case comes clearly within the statutory language. See *United States Lines Co.*

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2 In the opinion accompanying Order No. E-14012, the Board said at page 12:

"It must always be realized that this entire system of joint carrier screening of travel agencies is a substantial departure from the normal free competitive practices of our economy, and that it would be clearly in violation of the Federal antitrust laws were it not for the immunity extended by Section 414 of the Act."

3 "POOLING AND OTHER AGREEMENTS

Filing of Agreements Required

Sec. 412(a) Every carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"Approval by Board

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act;

v. *CAB*, 165 F. 2d 849 (2d Cir. 1948); *Apgar Travel Agency, Inc.* v. *National Air Transp. Ass'n*, 107 F. Supp. 706 (S. D. N. Y. 1952). It may well be that Congress did not intend to cover so broad an area by enacting §412, and that the airlines should not be permitted to exercise concerted control which is immune from antitrust regulation over some related industry such as that of ticket agencies. But there is no indication in either the words of the statute or in its legislative history that would justify our reading §§412 and 414 narrowly to insulate airlines from antitrust liability to other airlines only and not to protect it from suits by those engaged in affiliated services affected by an agreement among the airlines.

Nor is there any merit to the petitioner's contention that the Board, once having approved an agreement, could not act on its own to investigate and conditionally disapprove. The exemption from the operation of the antitrust laws is valid only so long as the Board believes that the agreement is not adverse to the public interest. Section 412(b) clearly provides that one decision on an agreement does not bind the Board as to later agreements, and that it may disapprove an agreement "whether or not previously approved by it." If complaints regarding the operation of a system established by an approved resolution come to its attention, the Board is justified in reopening the case and considering the agreement anew. Nor is the Board bound to approve or disapprove agreements in their entirety. It is true that §15 of the Shipping Act of 1916, 46 U. S. C. §814, on which §412 of the Civil Aeronautics Act was modeled, provides that the Federal Maritime Board may "dis-

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except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

approve, cancel, or modify any agreement," whereas §412 says only that the Board may "by order disapprove." However, the power to condition its approval on the incorporation of certain amendments is necessary for flexible administrative action and is inherent in the power to approve or disapprove. We would be sacrificing substance to form if we held invalid any conditional approval but affirmed an unqualified rejection accompanied by an opinion which explicitly stated that approval would be forthcoming if modifications were made.

The petitioner's final objection is that the procedure established by §§412 and 414 of the act amounts to an unconstitutional delegation of legislative power. Our attention is called to the decisions of the Supreme Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). No legislative delegation exists here, however. Under §412 agreements between air carriers are to be filed with the Board and approved or disapproved by it. These agreements bind only the parties to them, and impose no restriction on carriers who are not parties. Nor does the Board's approval of an agreement amount to an unconstitutional exercise of legislative power. By reason of §414, activity pursuant to an approved agreement is insulated from the operation of the antitrust laws, but the Board may approve only such agreements as are not "adverse to the public interest." This standard is definite enough to withstand constitutional attack, see *New York Central Securities Corp* v. *United States*, 287 U. S. 12, 24 (1932), and the exemption from regulation of such concerted activity as, in the opinion of a regulatory public agency, meets the standard is not unlawful. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 396 (1940).

We therefore dismiss the petitions to review the orders relating to the IATA investigation and affirm the orders entered pursuant to the ATC investigation.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1960

Nos. 92 and 93

JAMES F. McMANUS,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

JUDGMENT AND DECREE

These causes having come on for hearing on the transcripts of the records from the Civil Aeronautics Board, and the Court, upon consideration of the records, briefs and arguments, having filed its opinion herein on February 6, 1961, it is

ORDERED, ADJUDGED AND DECREED that the orders of the Civil Aeronautics Board of which review is sought in case No. 92 be, and they hereby are, affirmed; and it is further

ORDERED, ADJUDGED AND DECREED that the petitions for review in case No. 93 be, and they hereby are, dismissed.

J. EDWARD LUMBARD
LEONARD P. MOORE
USC JJ

Dated: February 21, 1961.